83-1192

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Office - Supreme Court, U.S
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JAN 18 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILFORD LEROY THOMPSON,
Petitioner,

versus

JOHNS-MANVILLE SALES CORPORATION, ET AL.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

QUESTION FOR REVIEW

Whether it was an abuse of discretion for the Court of Appeals to decline to certify an issue of first impression, under Louisiana law, to the Louisiana State Supreme Court, where such certification would have been determinative of critical legal issues in the case at bar, as well as numerous other similar cases now pending on the dockets of Louisiana federal district courts.

PARTIES

Petitioner, Wilford Leroy Thomas, is a person of the full age of majority and a resident of the State of Louisiana.

Respondent, GAF Corporation, is a Delaware Corporation, which, at all times pertinent hereto, was doing business in Louisiana.

Respondent, Nicolet Industries, Incorporated, is a Pennsylvania Corporation, which, at all times pertinent hereto, was doing business in Louisiana.

Respondent, Atlas Turner, Incorporated, is a Canadian Corporation which, at all times pertinent hereto, was doing business in Louisiana.

Respondent, Raybestos-Manhattan, Incorporated, is a New Jersey Corporation which, at all times pertinent hereto, was doing business in Louisiana.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILFORD LEROY THOMPSON,
Petitioner

versus

JOHNS-MANVILLE SALES CORPORATION, ET AL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, denying petitioner's application for a rehearing, is attached in the Appendix, P. A-19. The opinion and decision of the United States Court of Appeals, on original hearing, is attached in the Appendix, P. A-9. The opinions and decisions of the United States District Court for the Middle District of Louisiana, is attached in the Appendix, Pages A-1 through A-8.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit denying petitioner's request for a rehearing, was entered on October 20, 1983. This petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of the Supreme Court of the United States is invoked under the provisions of 28 U.S.C. 1254.

STATUES IN QUESTION

LOUISIANA REVISED STATUTE, TITLE 13, Section 72-1 (1972) Declaration of state law to federal courts 72.1

A. The Supreme Court of this State may, by rule of court, provide that when it shall appear to the Supreme Court of the United States, or to any Court of Appeals of the United States, that there are questions or propositions of the laws of this state, which are determinative of said cause, and there is no clear controlling precedent in the decisions of the Supreme Court of this State, such federal appellate court may certify such questions or propositions of the laws of this State to the Supreme Court of this State for instructions concerning such questions or propositions of state law, which certificate the Supreme Court of this State may, by written opinion, answer.

B. The Supreme Court of this State is hereby authorized and empowered to collaborate with any and all other courts of last resort of other States and of the United States in the preparation and approval of uniform rules of court to make effective this and similar laws.

STATEMENT OF THE CASE

Petitioner, Wilford Leroy Thompson, Jr., was employed by various contractors as an absestos insulation worker during the years 1952 through 1978. During the course of his employment, Mr. Thompson removed and installed asbestos containing thermal insulation products. As a result of exposure to these asbestos products, petitioner inhaled asbestos fibers and dust emitted by the normal use and handling of these products, leading to the development of the lung disease, asbestosis. Mr. Thompson was subsequently forced to cease working because of his permanent disability, and filed his original lawsuit for personal injuries against twenty-three manufacturers of asbestos insulation products. Jurisdiction of the federal district court was based on diversity of citizenship.

The petitioner has alleged that all twenty-three of the defendants are liable to him for his injuries because, at the time of petitioner's injurious exposure, all of the named defendants in the original lawsuit either manufactured, distributed or sold asbestos insulation products.

The petitioner had some independent recollection of the names of certain manufacturers whose asbestos products he had used during the course of his employment. However, Mr. Thompson could not claim that his recollection was exclusive or certain as to *all* of the asbestos products to which he was exposed. The reason for this is that petitioner's exposure extended back over a twenty-six year period, at a time when Mr. Thompson had no need to photographically imprint the names of all the asbestos products which he used. Furthermore, much of Mr. Thompson's work entailed the removal of old asbestos insulation products, a process which generated a large amount of the asbestos dust to which he was exposed. Since many of the products had been

installed by others months or years earlier, there is no means by which to identify these manufacturers. The passage of time has also hindered petitioner's ability to locate documentary evidence of sales from the asbestos manufacturers because many of the records from the 1950's and 1960's have been lost or destroyed.

The respondents herein are manufacturers of asbestos insulation products whose names Mr. Thompson could not specifically recall. As a result, these defendants were granted a summary judgment, although at least two of the four (GAF and Raybestos-Manhattan) specifically admitted in answers to interrogatories that their asbestos products were sold in Louisiana during the relevant time period.

The facts of this case present an issue of first impression under Louisiana law. Never before have the courts of Louisiana had to consider the application of traditional Louisiana tort doctrine to a case such as the one presented by the petitioner. In opposition to the motions for summary judgment filed by the respondents herein, petitioner proposed that the theory of market share liability would be applicable to the novel facts presented by this case. The theory of the applicability of market share liability has never been passed upon by the Louisiana State Supreme Court.

Although the possibility of certifying a question to the Louisiana Supreme Court on the issue of market share liability was raised during argument before the Fifth Circuit Court of Appeals, the appellate court eventually declined to so certify. The decisions of the trial court on the motion for summary judgment were affirmed. Petitioner now pursues his remedy against these defendants in this application to the Supreme Court of the United States.

STATEMENT OF REASON FOR THIS COURT TO ISSUE WRIT AND ARGUMENT THEREFOR

> The Court of Appeals has so far departed from an accepted and reasonable course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

It is the position of the petitioner that the Court of Appeals' failure to certify the important issues of first impression presented by the facts of this case to the Supreme Court of the State of Louisiana, constitutes an abuse of discretion. In failing to exercise its option to so certify questions to the Louisiana Supreme Court, the Court of Appeals has unreasonably denied the petitioner an opportunity for relief under the laws of Louisiana and furthermore has denied the highest Court of the State of Louisiana the opportunity to address an issue of paramount importance to the citizens of Louisiana.

A. *The case for certification in diversity jurisdiction*

Since *Erie v. Thompkins*, 304 U.S. 64 (1938), the federal courts, sitting in diversity jurisdiction cases, have been required to ascertain and apply state law. When enforcing state created rights, federal diversity courts must apply state law in a manner identical to a state court to discourage forum shopping and to eliminate inequitable administration of state law. *Erie*, supra; *Hanna v. Plumer*, 380 U.S. 460 (1965); see, generally, "Civil Procedure – Scope of Certification in Diversity Jurisdiction," *Rutgers Law Review*, Vol. 29, Late Summer 1976, 1155, 1157. The application of the *Erie* doctrine is not difficult as long as the applicable state law has been clearly established by the state courts of the forum. When, however, state law is unsettled or undeclared, the job

of the federal court becomes a difficult one. In such instances, "the federal judge must often trade his judicial robes for the garb of a prophet." Chief Judge John R. Brown, "Certification - - Federalism in Action," *Cumberland Law Review*, Volume 7:455 (1977), 455. At that point, the federal judge must decide whether to "first guess" the state judiciary or find a way to abstain from a decision until the state court can resolve its own law. Brown, *supra*, 455.

One method of refraining to decide an unsettled or undeclared issue of state law was to stay the proceedings in the federal suit and await a decision by a state court on the issue. This has become known as the abstention doctrine. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). Abstention in diversity cases, however, was not long to be an easy way out for federal judges facing difficult questions of state law. In the historic case of *Meredith v. Winter Haven*, 320 U.S. 228 (1943), the Court of Appeals had ordered abstention, finding the state law to be unclear. This Honorable Court reversed, stating:

> [W]e are of the opinion that the difficulties of ascertaining what the state courts may hereafter determine state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision. . . .
>
> . . .[I]t has from the first been deemed the duty of the federal courts . . . to decide questions of state law. . . . *Meredith*, supra, at 234.

The need for a means of obtaining a state court resolution of unsettled or undeclared areas of state law outside of the narrow scope of diversity abstention, led to the development

of a new judicial mechanism: certification. Certification provides an authoritative resolution of state law issues by submitting them directly to the highest state court, thus sparing the litigants the delay and expense inherent in abstention. The federal court of appeals supervises the composition of the issues to be certified, thus retaining control over the nature and scope of the questions to be certified. Most importantly, state law is applied by the diversity court just as would have the state court, assuring the consistency of application of state law in both federal and state forums. See *Rutgers Law Review, supra*, 1160.

A procedure for certification is indeed available to Federal Courts of Appeals in the State of Louisiana. In 1972, the Louisiana legislature passed section 72.1 of the Louisiana Revised Statutes, Title 13, which authorized the certification of questions of state law by the federal court of appeals to the Louisiana Supreme Court. (The text of §72.1 is set forth in its entirety, as required, in a preceding section of this petition, at page 3).

Certification is not mandated by either the Louisiana Revised Statute or by federal court rules. The discretionary nature of the certification procedure was discussed by this Honorable Court in *Lehman Bros. v. Schein*, 416 U.S. 390 (1974):

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy and resources and helps build a cooperative judicial federalism. It's use in a given case rests in the sound discretion of the federal court.

The Court in *Lehman, supra,* went on to vacate the decision of the Court of Appeals and remanded the case for reconsideration of whether the issues should be certified to the Florida Supreme Court, in view of the novelty of the question presented and the great unsettlement of Florida law. Thus, although cases in which *Lehman* will require use of the certification procedure will probably not be numerous, the opinion does provide authority for, and encouragement of, expanded scope of use of certification. *Rutgers Law Review, supra,* at 1162.

B. *The Decision Not to Certify, on the Facts of this Case, Constitutes an Abuse of Discretion*

The notion of "discretion" and what constitutes an abuse of that discretion, has been the subject of numerous cases set in varied factual backgrounds. One of the most widely-quoted passages on "abuses of discretion" came from the pen of Judge Magruder in *In re Josephson,* 218 F.2d 174 (C.A., 1st Cir., 1954), at p. 182:

> "Abuse of discretion" is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.
> *Josephson,* at p. 182.

See also *Wong Wing Hang v. Immigration and Naturalization Service,* 360 F.2d 715 (C.A., 2d Cir., 1966); *Carroll v. Am. Federation of Musicians of the U.S. and Canada,*

295 F.2d 484 (C.A., 2d Cir., 1961); *Chism v. National Heritage Life Co.*, 637 F.2d 1328 (C.A., 9th Cir., 1981); *Pue v. Sillas*, 632 F.2d 74 (C.A., 9th Cir., 1980). It is petitioner's contention that the Court of Appeals in the case at bar has committed a clear error of judgment when, after weighing the relevant factors, it refused to utilize the certification procedure.

The relevant factors to be considered in whether or not to use certification were set forth by the Fifth Circuit in *State of Florida, ex rel Shevin v. Exxon Corp.*, 526 F.2d 266 (C.A., 5th Cir., 1976). The court cited the following factors: 1) the closeness of the question and the existence of sufficient sources of state law to allow a principaled rather than a conjectural decision; 2) whether the case is a diversity case or a case involving questions of federal law; 3) delay which may occur as a result of certification; 4) possible inability to frame the issue, and, perhaps most important to the instant case, 5) the likelihood of the reoccurrence of the particular legal issue.

The Court in *Shevin, supra*, refused to certify the question to the Florida Supreme Court because (1) the legal question was not an "extremely close one"; (2) the court would not be "required to guess state law from one or two questionable precedents because the court had a long line of Florida cases; and 3) the case was "primarily a federal case, and one which has not been lured into federal court by means of the diversity jurisdiction. *Shevin*, supra, at p. 275. *Shevin* is distinguishable from the present case because 1) the issue of market share liability under the facts of this case is one of first impression in Louisiana; 2) the case is not primarily a federal case but is a true diversity case and 3) the likelihood of the reoccurrence of the same legal issue is extremely high.

The issue of certification is not an unfamiliar one within the Fifth Circuit. In *Barnes v. Atlantic and Pacific life Ins.*

Co. of America, 514 F.2d 704, although the court stated that judgment and restraint are to be used in certifying a question, yet it welcomed the opportunity in that case to certify a question of state law to the Alabama Supreme Court, reasoning that:

> [W]hen the state law is in doubt, especially on the underlying public policy aims, it is the best administration of justice to afford the litigants a consistant final judicial resolution by utilizing the certification procedure. *Barnes*, at 706.

The majority decision rendered by the Fifth Circuit in the present case (Appendix, p. A-9) claims to be an "Erie guess." Petitioner contends, however, that the opinion rendered by the majority sounds more like the doctrine of abstention, thinly disguised as an "Erie guess", than an attempt to reason what the Louisiana courts would have done in a similar fact situation. The majority stated:

> We see little purpose in discussing in detail the potential applicability of these theories to Mr. Thompson's case; writing in diversity, we write on the wind. Louisiana will or will not adopt either or both [theories] at some future time. In no reported case has it done so at present. . . That is not enough to support our adoption for Louisiana of a particular and radical mode of its expansion. Such departures are for Louisiana courts, not for us. (Citation omitted).

This rationale would seem to fly in the face of *Meredith, supra*, which emphasized the duty of decision in diversity cases, not withstanding the difficulty of making that

decision. If, as the majority claimed, such a "departure" is for Louisiana courts, then petitioner suggests that the most reasonable and obvious solution would have been to certify the issue to the Supreme Court of Louisiana.

The majority decision admitted that there are no precedent-setting decisions regarding market share liability under this factual background by the Louisiana Supreme Court. While this is not, of itself, enough to trigger certification, it *is* one of the factors which, under the *Shevin* rationale, *supra*, should be weighed in making the decision to certify.

Further, there is another important factor which the majority opinion fails to note - - the likelihood of the reoccurrence of the legal issues in the present case. Petitioner's case is not an isolated, one-time case. There are a large number of similar cases currently pending in Louisiana's federal district courts which would be directly affected by a Louisiana Supreme Court decision on market share liability. In the federal district court for the Eastern District of Louisiana alone, there are at least twenty-two cases currently filed which present a factual picture almost identical to that of petitioner, Mr. Thompson. (See Appendix IV, page A-21) Counsel for petitioner is also aware of approximately twenty factually similar cases pending on the docket of the federal district court for the Middle District of Louisiana.

The large number of similar Louisiana cases, involving victims of asbestos exposure, all in federal forums under diversity jurisdiction, will continue to rise. By failing to utilize certification, the Court of Appeal has unreasonably declined to use the one powerful tool available by which to guide itself to a proper determination of Louisiana law in all of these cases.

In his eloquent and well-reasoned dissent in the present case, Judge Goldberg stated:

> In the case before us now, the majority affirmatively decides to apply traditional tort doctrines to a new and different species of injury. The majority notes that there are no Louisiana cases relying on market share or enterprise liability and justifies its result with a reluctance to impose a "radical" change in tort law upon Louisiana. What the majority chooses to ignore, however, is that there are no Louisiana cases refusing to apply market share or enterprise liability to similar factual situations. This deliberate blindness enables the majority to *sub silentio* impose upon Louisiana an equally radical extension of traditional tort doctrines to a case for which those doctrines are ill-adapted. Asbestos related injuries are different and this is an important case of first impression.

Judge Goldberg's characterization of asbestos-related diseases as "a new and different species of injury" is especially apt. This "new species of injury" will be appearing with ever-increasing frequency on the dockets of Louisiana federal courts. All of these law suits will be rooted in diversity, requiring an application of state law, as did the instant case. Petitioner would respectfully suggest that the failure of the Court of Appeal in this case to either follow the dictates of *Erie* and *Meredith*, *supra*, and make a reasonable prediction of state law or to certify the question to the Louisiana Supreme Court, has had the effect of penalizing petitioner for choosing the federal diversity forum. Certainly, it is not likely that the Louisiana Supreme Court would have dismissed petitioner's theories of market share liability with

the comment that they "will or will not adopt either or both theories at some time in the future." The issue would have been confronted and resolved, just as it could have been in petitioner's federal case by the use of certification.

The majority in the present case have side-stepped their duty to predict state law in this case of first impression and seemingly have chosen to ignore the option of certification. By doing so, the majority has relegated this petitioner and others like him to the confines of a tort doctrine that is ill-suited to a case such as this one.

Petitioner would urge that the failure to certify the issues in this case to the Louisiana Supreme Court amounts to an abuse of the discretion vested in the Court of Appeals. The petitioner contends that the Court of Appeals made "a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *In re Josephson, supra.* As Judge Goldberg stated in his dissent:

> I can think of few cases more appropriate for certification than this one. The legal principles involved are unsettled and far-reaching. The rule established will have great impact on the well-being of the citizens of Louisiana. I am aghast at the possibility that after we deny this plaintiff relief, Louisiana will acknowledge enterprise or market share as a viable theory, but that is a risk the majority is willing to take.

C. *Conclusion*

The petitioner strenuously urges that the failure of the Court of Appeals to use the certification procedure, considering all the relevant facts of this case, amounts to an abuse

of discretion. This abuse of discretion is such a departure from the accepted and reasonable course of judicial proceedings that an exercise of this Honorable Court's supervising powers is called for.

When a federal diversity court finds itself confronted by an established but outmoded rule of law and a novel factual situation, its resolution of the case may be inconsistant and unjust if the highest state court thereafter declares the unworthiness of the former rule. Such a decision would not merely be incorrect, but aberrant as well, since the outcome is not required by state law and neither court may believe the decision to be just. *Rutgers Law Review*, *supra*, at 1164. Even one such decision would be an abomination.

Petitioner respectfully submits that disparities from case to case and from circuit to circuit will continue to arise with regard to the use of certification. Only when this Honorable Court sets forth guidelines as to the acceptable scope of the certification mechanism in diversity cases will there be any assurance that certification will be more uniformly employed. Petitioner therefore respectfully requests that his application for writs of certiorari be GRANTED.

CERTIFICATE OF SERVICE

Counsel for petitioner certifies that service of this Petition for Writ of Certiorari has been made upon counsel for respondent this date, in accordance with law, by depositing a copy thereof in the U.S. mail, postage prepaid, to the following:

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APPENDIX I(A)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
MARCH 18, 1982
POLOZOLA, J.

WILFORD LEROY THOMPSON

VERSUS

FIBREBOARD CORPORATION, ET AL

CIVIL ACTION
NUMBER 79-322-B

This matter is before the Court on the motion of the defendant, Nicolet Industries, Inc., for summary judgment. No oral argument is required on this motion. Nicolet contends that summary judgment should be granted in its favor since the plaintiff has failed to submit any evidence which would in any way show that the plaintiff used or was exposed to the defendant's product. In opposition the plaintiff argues that the motion for summary judgment should be denied on the basis of "enterprise liability".

In support of its motion, Nicolet relies on the two depositions of the plaintiff in which the plaintiff lists the companies whose products he has worked with or been exposed to. Nicolet is not on this list. The plaintiff testified that this list was accurate. During his second deposition the plaintiff stated that those lists were accurate and that he did not remember being exposed to Nicolet products. Additionally, in the answers to interrogatories filed in the record before

the deposition lists were drafted, the plaintiff did not include Nicolet as a possible supplier of materials with which the plaintiff worked.

In opposition to this motion, the plaintiff relies on the decision in *Dombroff v. Armstrong Cork Co.*, Case No. 79-14048, Eleventh Judicial Circuit in and for Dade County, Florida. In that case the court found that manufacturers who exercise collective control over a risk-producing product and who have unleased this dangerous product, may be liable to those likely to be injured by its products in proportion to its share of the relevant market in which plaintiff was injured. The Court does not find that this decision is in any way binding on it and further could not find any indication that this theory has been accepted by any Louisiana court. Further, even if enterprise liability were applicable in this case, the plaintiff has not met all of the requisites required by *Dombroff*.

When a motion for summary judgment is filed, as was done in this case, a party cannot rely solely on his pleadings to oppose this motion, but must file some credible evidence which would indicate that there is material issue of fact in the case which precludes the Court from granting a summary judgment. This plaintiff has failed to do this. There is absolutely no evidence in the record which would in any way indicate that Nicolet is responsible for plaintiff's injuries, nor is there any evidence in the record which would cause the Court to find that there is a material dispute in the facts over whether the plaintiff was exposed to Nicolet's product. Because there is no material issue of fact in dispute and because Nicolet is, as a matter of law, entitled to summary judgment:

IT IS ORDERED that the motion of Nicolet Industries, Inc. for summary judgment be and it is hereby GRANTED.

/s/ Frank J. Polozola
United States District Judge

APPENDIX I(B)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
MAY 19, 1982
POLOZOLA, J.

WILFORD LEROY THOMPSON

VERSUS

FIBREBOARD CORPORATION, ET AL

CIVIL ACTION
NUMBER 79-322-B

This matter is before the Court on the motion of the defendant Atlas Turner, Inc. for summary judgment. No opposition has been filed to this motion. No oral argument is required on this motion.

Atlas Turner, Inc. contends that summary judgment should be granted in its favor since the plaintiff has failed to submit any evidence which would in any way show that the plaintiff used or was exposed to Atlas' product.

In support of its motion, Atlas relies on the two depositions of the plaintiff in which the plaintiff lists the companies whose products he was exposed to. Atlas is not on this list. The plaintiff testified that this list was inaccurate. The only indication that the plaintiff was exposed to the mover's product which appears in the record is in his answers to the interrogatories of Fibreboard Corporation submitted on March 21, 1980 and in a brief reference in his second deposition. In the interrogatory responses, the plaintiff lists

Atlas as a supplier of materials to which he was exposed. However, in the two subsequent depositions the plaintiff stated that that list had been inaccurate. When questioned by the mover's attorney at the second deposition concerning the lists attached to the depositions, the plaintiff stated that those lists were accurate and that he did not remember being exposed to Atlas Turner products. In that same deposition the plaintiff does mention that he believes that he had worked with the product "aircell", but cannot remember where the work occurred or who produced the product. By affidavit W. Gallant, the financial vice-president of Atlas Turner, Inc. states that the product "Aircell" has never been sold in the United States with the exception of a single sale to the United States Government.

When a motion for summary judgment is filed, as was done in this case, a party cannot rely solely on his pleadings to oppose this motion, but must file some evidence which would indicate that there is a material issue of fact in the case which precludes the Court from granting a summary judgment. This, the plaintiff has failed to do in this case. The Court agrees with the mover's allegation that there is no evidence in the record to support the plaintiff's claim that he was exposed to mover's product. There being no material issues of fact in dispute, Atlas is, as a matter of law, entitled to summary judgment herein.

Further, since the plaintiff failed to file any opposition to Atlas' motion as required by the local rules of this Court, the Court must and does presume that the plaintiff has no opposition to the motion. Thus, for this additional reason, the motion of Atlas Turner, Inc. for summary judgment should be granted.

Therefore:

IT IS ORDERED that the motion of Atlas Turner, Inc. for summary judgment be and it is hereby GRANTED.

/s/ Frank J. Polozola
United States District Judge

APPENDIX I(C)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

WILFORD LEROY THOMPSON

VERSUS

FIBREBOARD CORPORATION ET AL

CIVIL ACTION
NUMBER: 79-322
SECTION "B"

ORDER

Filed December 26, 1981

CONSIDERING THE FOREGOING request for Entry of Final Judgment:

IT IS HEREBY ORDERED that the motion for summary judgment of defendant, GAF Corporation, be and the same is hereby granted, for the reasons set forth in the Court's minute entry dated December 1, 1981 and that the Clerk of this Honorable Court enter a final judgment upon the order herein dismissing plaintiff's complaint, with prejudice, as to defendant, GAF Corporation, and this Honorable Court expressly determines that there is no just reason for delay in the entry of final judgment of this order.

Baton Rouge, Louisiana, this 29 day of December, 1981.

/s/ Frank J. Polozola
U. S. District Judge

CERTIFICATE

I certify that on this 29th day of December, 1981 a copy of the above and foregoing has been served upon all interested counsel of record by mail.

/s/ Robert N. Ryan
Robert N. Ryan

APPENDIX I(D)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

WILFORD LEROY THOMPSON

VERSUS

FIBREBOARD CORPORATION, ET AL

CIVIL ACTION
NO. 79-322-B

JUDGMENT

Filed December 9, 1981

For the written reasons assigned,

IT IS ORDERED AND ADJUDGED that Judgment be entered in favor of defendant, Raybestos-Manhattan, Inc., and against the plaintiff, Wilford Leroy Thompson, dismissing plaintiff's complaint, with prejudice, as to defendant, Raybestos-Manhattan, Inc.

Baton Rouge, Louisiana, December 9, 1981.

/s/ Frank J. Polozola
United States District Judge

APPENDIX II

Wilford Leroy THOMPSON, Jr.,
Plaintiff-Appellant,

v.

JOHNS-MANVILLE SALES CORP., et al.,
Defendant

Raybestos-Manhattan, Inc., et al.,
Defendants-Appellees.

Nos. 82-3033, 82-3038, 82-3242
and 82-3354.

United States Court of Appeals,
Fifth Circuit.

September 16, 1983.

Insulation worker allegedly suffering from asbestosis brought suit against numerous manufacturers of asbestos products. Four defendants, whose products plaintiff could not recall using, moved for summary judgment. The United States District Court for the Middle District of Louisiana, at Baton Rouge, Frank J. Polozola, J., granted the motion, and plaintiff appealed. The Court of Appeals, Gee, Circuit Judge, held that Louisiana law would not permit use of "enterprise" or market share" liability to permit plaintiff to dispense with particular proof of causation.

Affirmed.

Goldberg, Circuit Judge, filed a dissenting opinion.

1. **Federal Civil Procedure key 2547**

Fact that plaintiff did not file response to defendants' motions for summary judgment did not compel affirmance of granting the motions. Fed.Rules Civ.Proc.Rules 56(e), 56 note, 28 U.S.C.A.

2. **Federal Liability key 74**

Theories which shift burden of proof of causation from injured plaintiff to those defendants who were connected with the injury and one or more of whom undoubtedly caused it were not applicable to dispense with necessity of proof of causation with respect to those manufacturers of asbestos products whose products plaintiff did not recall using, in suit by plaintiff, allegedly suffering from asbestosis, against multiple defendants, some of whose products plaintiff did recall using.

3. **Products Liability key 75**

Louisiana law would not permit use of "enterprise" or "market share" theories of liability, in asbestosis case against multiple defendants, to dispense with particular proof of causation with respect to those defendants whose products plaintiff did not recall using.

Appeal from the United States District Court for the Middle District of Louisiana.

Before GOLDBERG, GEE and RANDALL, Circuit Judges.

GEE, Circuit Judge:

This Louisiana diversity appeal requires us to determine whether the law of that state would dispense with proof of causation against some of multiple defendants in an asbestosis case.

Plaintiff Thompson, employed as an insulation worker from 1952 to 1978, handled products containing asbestos during that period. As a result, he contends, he inhaled dust and fibers that produced the disease or condition of asbestosis. He was able to recall the brand names of some of the products to which he was exposed. Because he did not recall those of today's four appellees and was unable to point to any other evidence connecting their products with his alleged injuries, each was granted summary judgment on the ground that as to it the element of causation was lacking as a matter of law. Thompson appeals, suggesting the applicability to his case of various legal theories that he asserts dispense with causation as requisite to a recovery of damages. Partly on the basis of an *Erie* guess, we affirm.

[1] We are met at the threshold of our analysis with the contention of several appelles that since Mr. Thompson filed no response to their motions for summary judgment, we need look no further and must affirm on that basis.

Appellees point to no case law supporting their proposition but do cite FRCP 56(e), which reads in relevant part:

> When a motion for summary judgment is made and supported as provided in this rule, and adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth

> specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The Notes accompanying the 1963 Amendment to this rule explain that these two sentences were added to overcome a line of cases which existed, chiefly in the Third Circuit, permitting parties defending against motions for summary judgment to rest on their pleadings.

The quoted language generally supports the argument advanced; however, recent precedent in our circuit, by which we are bound, squarely defeats it. In *White v. Thomas*, 660 F.2d 680, 682-83 (5th Cir. 1980), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed.2d 148, we held that the court must look to the allegations of facts made in the pleadings even where plaintiff,

> filed nothing in opposition to the motion save a memorandum asserting that some of the facts were disputed. Even in cases where the party against whom summary judgment is sought fails to comply with Fed.R.Civ.P. 56(e), it is inappropriate to grant summary judgment on the merits on those issues whose decision depends on resolution of evident factual disputes not put beyond dispute by the affidavit, especially if a limited evidentiary hearing did not afford the party an opportunity to adduce his full case.

Various theories are advanced by Mr. Thompson for dispensing with proof that the products of these defendants caused or contributed to cause his condition. Some clearly will not serve to do so.

[2] Clearly inapposite to his case are such authorities as *Hilburn v. Johnson*, 240 So.2d 767 (La.Ct.App. 1970), and *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W.2d 731 (1952). These permit the imposition of joint and several liability on persons whose separate wrongful actions, not done in concert, contribute in unknown proportions to cause an indivisible injury. The first concerns two persons who collided with a motorcyclist, causing his death. The second treats of two pipeline carriers whose separate salt water lines ruptured, polluting a lake. In neither was there doubt that each of the two defendants in fact contributed to the overall injury in *some* degree; and neither authority does more than decline to exonerate a defendant merely because the amount by which he contributed to cause it cannot be ascertained. Even less in point are concert of action theories, where persons acting in knowing collaboration cause an injury and are held liable in solido for the effect of their common scheme.

Also to be distinguished are theories of alternative liability such as those of *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948) (liability imposed on both of two hunters who fired toward plaintiff, burden on each defendant to show he did *not* cause injury), and of group res ipsa loquitur. *Ray v. Ameri-Care Hospital*, 400 So.2d 1127 (La.Ct.App.1981). All of these concern defendants who were proved to have some factual connection with the plaintiff's injury; to apply them to defendants as to which there is no proof of any such connection would beg the question of causation entirely. Like the indivisible injury cases, these shift the burden of proof of causation from the injured plaintiff to those defendants who were connected with it and one or more of whom undoubtedly caused it although, unlike those cases, the result may be that—because of his inability to prove himself innocent—one who in fact contributed nothing to the injury may still be held liable for it. The policy choice

underlying such theories seems to be that in the extreme case where one or more of a defined group unquestionably caused an injury and the choice is between exonerating all because the plaintiff cannot show which did so and holding all liable who cannot prove their innocence, the latter result is preferable. Such is not the case here, where a large group of defendants whose products Thompson did recall using remain before the court. These defendants are not members of it.

[3] Mr. Thompson's final set of theories do, in fact, dispense with particular proof of causation. These are ones of "enterprise" and "market share" liability, exemplified by *Hall v. DuPont de Nemours & Co.*, 345 F.Supp. 353 (E.D.N.Y. 1972), suggesting the possibility of joint industry-wide liability for particular blasting cap injuries, and *Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 163 Cal.Rptr. 132, 607 P.2d 924 (1980), imposing and allocating several liability by market share. We see little purpose in discussing in detail the potential applicability of these theories to Mr. Thompson's case; writing in diversity, we write on the wind. Louisiana will or will not adopt either or both at some future time. In no reported case has it done so at present, nor have any substantial number of other jurisdictions. Both theories represent radical departures from traditional theories of tort liability. All that Thompson can advance in support of his claim that Louisiana would adopt either if presented his case is a supposed general tendency or trend on the part of Louisiana courts to expand the liability of manufacturers.

That is not enough to support our adoption for Louisiana of a particular and radical mode of its expansion. Such departures are for the Louisiana courts, not for us. See *Rhynes v. Branick Mfg. Corp.*, 629 F.2d 409 (5th Cir. 1980) ("product line" liability).

AFFIRMED.

GOLDBERG, Circuit Judge, dissenting:

Today the majority has determined to take an *Erie* guess and "write upon the wind." The majority predicts that Louisiana, if faced with the novel and distinct problems of asbestos related injury, would do nothing more than reflexively apply traditional tort doctrines. I am unwilling to arrogate to myself the decisionmaking duties and competence of the Louisiana Supreme Court. Rather than writing upon the wind, I would consult the chief meteorologists; this case of first impression is an ideal specimen for certification, and because the majority declines to do so, I must dissent.

I. ASBESTOS AND TORT LAW

Disease caused by exposure to asbestos presents monumental problems for tort law relating to causation. First, it is nigh impossible to point to a single fiber of asbestos as the cause of a cancerous lesion in the lungs of an asbestosis victim; asbestos related diseases usually develop after a period of exposure, perhaps from the prodcuts of many manufacturers. Second, even if the period of exposure were known, the long time between exposure and onset of symptoms may make it impossible for the victim to remember the sources of exposure. Third, even if the victim has a photographic memory, that might be of no help—much exposure is the result of previously installed asbestos-containing material, so the victim had no chance to learn the source.

My point here is not to dramatize excessively the legal plight of asbestos victims, but to illustrate that the factual predicate giving rise to potential liability from asbestos exposure is simply different from those that generated most tort doctrines. Without enumerating all of the occasions, suffice it for me to note that tort law has been an area quite open to evolutionary, if not revolutionary, forms of liability

in response to unanticipated factual paradigms. This has been particularly true in the area of causation, with a steady evolution, as circumstances demanded, from simple one-party negligence, to joint liability, to alternate liability, to burden-shifting presumptions such as res ipsa loquitur, to theories of market share and enterprise liability. Whether or not asbestos related injury is a circumstance calling for a doctrinal response is a weighty and difficult question; given the increasing inundation of the courts with asbestos related litigation, it is also a question of great consequence.

II. FEDERALISM AND CERTIFICATION

As I have briefly discussed, asbestos related injuries are different in legally important aspects from those types of injuries that present tort doctrines were designed to accommodate. Whether or not those doctrines will be extended to cover asbestos cases is a different sort of question from whether or not those doctrines will be applied to an automobile accident. In one instance a court writes upon a blank slate, in the other a court is closely hemmed in by precedent upon precedent.

In the case before us now, the majority affirmatively decides to apply traditional tort doctrines to a new and different species of injury. The majority notes that there are no Louisiana cases relying on market share or enterprise liability and justifies its result with a reluctance to impose a "radical" change in tort law upon Louisiana. What the majority chooses to ignore, however, is that there are no Louisiana cases refusing to apply market share or enterprise liability to similar factual situations. This deliberate blindness enables the majority to sub silentio impose upon Louisiana an equally radical *extension* of traditional tort doctrines to a case for which those doctrines are ill adapted. Asbestos related injuries are different and this is an important case of

first impression.

One of the stellar virtues of Our Federalism is that it provides a hothouse in which fifty-one flowers may blossom. The federal courts, moreover, are not cast in the role of head gardener. Under *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), federal courts sitting in diversity must follow state law. Occasionally, when the law of the state is not crystal-clear, a federal court may have to make an "*Erie* guess." See, *e.g.*, *Meredith v. City of Winter Haven*, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9 (1943). However, federal courts ought not necessarily assume the responsibility of deciding in the first instance important, unsettled questions of state law. *E.g.*, *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed.2d 835 (1968). *Cf. Clay v. Sun Insurance Office Ltd.*, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed.2d 1170 (1960).

We have a powerful mechanism for avoiding unnecessary *Erie* guesses–certification. *See generally* Brown, *Certification–Federalism in Action*, 7 Cum.L.Rev. 455 (1977) (one of certification's most ardent advocates, Circuit Judge John R. Brown, stating his case). When appropriate we may turn to the font of wisdom of Louisiana law for an authoritative statement. I can think of few cases more appropriate for certification than this one. The legal principles involved are unsettled and far-reaching. The rule established will have great impact on the well-being of the citizens of Louisiana. I am aghast at the possibility that after we deny this plaintiff relief, Louisiana will acknowledge enterprise or market share liability as a viable theory, but that is a risk the majority is willing to take.[1]

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1. My primary objection with the majority opinion is not the outcome of the *Erie* guess, but the fact that it makes a guess. However, I

CONCLUSION

As the majority opinion clickety-clacks down the *Erie* tracks, I fear I hear the sound of the cross-ties splintering. Were I the switchman I would sidetrack this case to the Louisiana switching yards where a locomotive of sufficient power to pull the freight of the majority opinion might be attached. As it is, I remain alone in the caboose, dissenting.

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1 (Continued)

am not sure that I would guess the same way, if forced to guess. First, I am not so sure that theories of market share of enterprise liability are such a radical departure from present tort doctrines as the majority suggests. Several manufacturers shipping asbestos related products into the state do not strike me as radically different from a group of hunters standing on the Texas side of the Sabine River and firing their shotguns east towards Louisiana—fibers of asbestos causing an injury are no more susceptible of identification than a shotgun pellet. *Cf. Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948). Nor does it seem inappropriate to me to shift the burden of proof to the asbestos manufacturer who shipped its products into Louisiana to show that its products did not contribute to an asbestos related disease contracted in Louisiana—when an individual is injured by asbestos, the facts speak for themselves, proclaiming that *some* manufacturer caused the injury. *Cf. Ray v. AmeriCare Hospital*, 400 So.2d 1127 (La.Ct.App. 1981). Second, the Louisiana courts have been most diligent in protecting their citizens from the hazards of unsafe products sold in the state, and might reasonably be expected to generate legal doctrines responsive to the factual problems posed by asbestos related injury. *See generally* Plant, *Comparative Negligence and Strict Tort Liability*, 40 La.L.Rev. 414 (1980); Note, *"Manufacturer" Warranty in Louisiana*, 33 La.L.Rev. 724 (1973).

APPENDIX III

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS.
82-3033, 82-3038,
82-3242 & 82-3354

WILFORD LEROY THOMPSON, JR.,
Plaintiff-Appellant,

versus

JOHNS-MANVILLE SALES CORP., ET AL.,
Defendant,

RAYBESTOS-MANHATTAN, INC., ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the
Middle District of Louisiana

Filed October 20, 1983

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion 9/16/83, 5 Cir., 198 __, _____F.2d ____)

(October 20, 1983)

Before GOLDBERG, GEE and RANDALL, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court

having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF
THE MANDATE.

APPENDIX IV

The following cases are currently pending on the dockets of the Sections of the United States District Court for the Eastern District of Louisiana and involve issues that are identical or nearly identical, to the case at bar:

DORIS RICHOUX, ET AL V.
ARMSTRONG CORK CORPORATION, ET AL
C.A. 80-2391 C/W 80-2522 "E" (2)

SABATHE AND CAMPIERE V.
JOHNS-MANVILLE, ET AL
C.A. 81-2025 "B"

HELEN CAPPO FALCON V.
JOHNS-MANVILLE, ET AL
C.A. 81-5153 "E"

PERSHING LEFORT V.
JOHNS-MANVILLE, ET AL
C.A. 82-0116 "B"

LEO BOWERS V.
JOHNS-MANVILLE, ET AL
C.A. 82-0320 "A"

RALPH MANGUNO V.
TURNER-NEWALL, LTD., ET AL
C.A. 82-1570 "A"

SEBASTIAN ROLLAND V.
JOHNS-MANVILLE, ET AL
C.A. 82-1760 "K"

MIKE MARINO V.
JOHNS-MANVILLE, ET AL
C.A. 82-1970 "E"

RONALD T. ESCHETE V.
JOHNS-MANVILLE SALES
CORP., ET AL
C.A. 82-2115 "J"

STANLEY KRANTZ V.
JOHNS-MANVILLE, ET AL
C.A. 82-2397 "B"

HERMAN C. WOESSNER V.
JOHNS-MANVILLE SALES
CORP., ET AL
C.A. 82-2406 "K"

GERALD WEBER V.
JOHNS-MANVILLE SALES
CORP., ET AL
C.A. 82-2499 "I"

CLAUDE BATEMAN V.
JOHNS-MANVILLE, ET AL
C.A. 82-2500 "J"

MARSHALL GOWLAND V.
JOHNS-MANVILLE SALES
CORP., ET AL
C.A. 82-2626 "D"

JOSEPHINE AIAVOLASITI V.
FIBREBOARD CORPORATION, ET AL
C.A. 82-4298 "H"

GEORGE AIAVOLASITI V.
FIBREBOAD CORPORATION, ET AL
C.A. 82-4452 "G"

NICHOLAS A. AIAVOLASITI V.
FIBREBOARD CORPORATION, ET AL
C.A. 82-4453 "F" (G)

PAUL SABATHE V.
JOHNS-MANVILLE CORP., ET AL
C.A. 82-4522 "L"

HAROLD HOFFMAN V.
FIBREBOARD CORPORATION, ET AL
C.A. 83-0174 "L"

MADELINE SCHNEIDER V.
FIBREBOARD CORPORATION, ET AL
C.A. 83-0620 "G"

JOHN A. SCHNEIDER V.
FIBREBOARD CORPORATION, ET AL
C.A. 83-0787 "F" (I)

ED SHALLEY V.
JOHNS-MANVILLE SALES CORP., ET AL
C.A. 83-1291 "C"

END OF DOCKET